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IN THE

# Supreme Court of the United States

MALINEE B. VIRACHACK and
RITNARONE T. VIRACHACK,

*Petitioners,*

*v.*

UNIVERSITY FORD D/B/A BOB BAKER FORD ("BOB BAKER FORD"), A CALIFORNIA CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

The Truth in Lending Act's ("TILA") (15 U.S.C. § 1631[a]) undisputed statutory purpose is "the informed use of credit" through "meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980). TILA is designed to aid the unsophisticated consumer so he or she will not be easily misled as to the total costs of their chosen financing, *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3d Cir. 1980), and thereby "to balance scales thought to be weighed in favor of lenders." *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 197 (3d Cir. 2000) (citations omitted).

In a split published decision, the majority of a Ninth Circuit panel held a $2,000 auto manufacturer's rebate, unknowingly forfeited as a condition to financing offered by the car dealer, is not a "finance charge" that must be disclosed under TILA. This majority decision allows car dealers to conceal from consumers the true cost of financing their purchase; in other words, to hide that the cost of their credit includes forfeiting a rebate of $2,000. Because a car purchase is one of the most important but perilous purchases for all consumers and this majority decision conflicts with TILA and case law, a writ of certiorari should issue.

This case presents the following issue for certiorari:

> 1. Whether the Truth In Lending Act (15 U.S.C. §§ 1601, *et seq.*) ("TILA") requires a car dealership to disclose, as part of the mandatory disclosure of "finance charge," an available cash rebate a consumer must forfeit to accept the car dealership's financing offer.

## PARTIES TO THE PROCEEDING

Petitioners are Malinee B. Virachack and Ritnarone T. Virachack ("the Virachacks"), individually and on behalf of all others similarly situated.

Respondent is University Ford dba Bob Baker Ford ("Bob Baker Ford"), a California corporation.

## CORPORATE DISCLOSURE STATEMENT

Malinee B. Virachack and Ritnarone T. Virachack are individuals and issue no stock, have no parent corporation and no publicly held company has an ownership interest in them.

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## CITATIONS OF OPINIONS AND ORDERS

The published opinion of the Court of Appeals for the Ninth Circuit is reported at *Virachack v. Univ. Ford*, 410 F.3d 579 (9th Cir. 2005) and is set forth in the appendix hereto. (Appa. 1a-15a.) The decision of the United States District Court for the Southern District of California is reported at *Virachack v. Univ. Ford*, 259 F. Supp. 2d 1089 (S.D. Cal. 2003) and is set forth in the appendix hereto. (App. 16a-28a.)

The Order of the Court of Appeals for the Ninth Circuit, denying petitioners' timely filed petition for rehearing and rehearing en banc in *Virachack v. Univ. Ford*, was filed July 6, 2005, and is set forth in the appendix hereto. (App. 29a-30a.)

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is timely filed. The decision of the Court of Appeals for the Ninth Circuit was filed on May 20, 2005. The Order denying the Virachacks' petition for rehearing and rehearing en banc was filed on July 6, 2005. On the Virachacks' application, this Court granted an extension of time to file this petition for a writ of certiorari up to and including November 3, 2005.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. section 1601:

> (a) Informed use of credit. The Congress finds that economic stabilization would be enhanced

> and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title [15 U.S.C.S. §§ 1601, *et seq.*] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

12 C.F.R. section 226.1:

> (a) Authority. This regulation, known as Regulation Z, is issued by the Board of Governors of the Federal Reserve System to implement the Federal Truth in Lending Act, which is contained in title I of the Consumer Credit Protection Act, as amended (15 U.S.C. §§ 1601, *et seq.*). This regulation also implements title XII, section 1204 of the Competitive Equality Banking Act of 1987 (Pub. L. 100-86, 101 Stat. 552). Information-collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. §§ 3501, *et seq.* and have been assigned OMB number 7100-0199.
>
> (b) Purpose. The purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost.

*15 U.S.C.* section 1605:

> (a) "Finance charge" defined. Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction.

12 C.F.R. section 226.4:

> (a) Definition. The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.
>
> * * *
>
> (b) Example of finance charge. The finance charge includes the following types of charges, except for charges specifically excluded by paragraphs (c) through (e) of this section:
>
> * * *
>
> (9) Discounts for the purpose of inducing payment by a means other than the use of credit.

## STATEMENT OF THE CASE

Ford Motor Company sometimes offers rebates, which it characterizes as "price reductions designed to boost sales." According to Ford Motor Company, factory rebates reduce the out-of-pocket costs to the purchaser. In a typical transaction with a factory rebate, the consumer simply assigns the rebate to the dealership. It is then shown as a credit on the purchase agreem nt as part of the down payment.[1]

The Virachacks bought a Ford Explorer from a Ford dealership, Bob Baker Ford, in November 2001. Like most people, the Virachacks purchased their new Explorer on a credit plan offered by the dealer. That credit plan had a below-market annual percentage rate ("APR") of 0.9%. To receive this low APR, the Virachacks had to forfeit an otherwise available $2,000 factory rebate for that Explorer. This $2,000 rebate was available to customers buying an Explorer with cash or financing at a higher APR. The Virachacks' Explorer would simply have cost them $2,000 less if they had paid cash or if they had financed in any other way.

It is undisputed the Virachacks were never told they had to forfeit a $2,000 rebate to get the 0.9% APR offered by Bob Baker Ford. The finance charge listed in the TILA disclosures given to the Virachacks ("The dollar amount the credit will cost you") did not include the amount of the rebate the Virachacks lost out on. According to their purchase contract, the Virachacks were told the total cost of their credit was just $417.47.

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1. The Official Staff Interpretation of TILA by the Federal Reserve Board treats manufacturer's rebates the same as seller's rebates. *See* Commentary to Fed. Reserve Bd., 12 C.F.R. Pt. 226, Supp. 1 § 226.18(b), ¶ 2.

To obtain that 0.9% rate, the Virachacks also agreed Bob Baker Ford would assign their retail installment contract to Ford Motor Credit Company. Unbeknownst to the Virachacks, Ford Motor Company conveyed the $2,000 rebate money to Ford Motor Credit Company to subsidize the $417.47 "finance charge" listed on the Virachacks' contract. FMCC's accounting reveals the real cost of the Virachacks' credit substantially exceeded the $417.47 listed in the purchase contract prepared by Bob Baker Ford.

Months later, the Virachacks learned that the 0.9% APR financing they obtained from Ford had cost them an additional $2,000 in the form of their forfeited rebate.[2]

* * *

The Virachacks sued Bob Baker Ford, alleging it violated the Truth In Lending Act ("TILA") (15 U.S.C. §§ 1601, *et seq.*) by failing to include the forfeited rebate as part of the total "finance charge" that must be disclosed under that Act. The parties filed cross-motions for summary judgment. The district court granted Bob Baker Ford's motion and entered judgment for them. The district court recognized the Virachacks' forfeiture of the $2,000 rebate was indeed a mandatory condition of receiving the 0.9% APR financing offered by Ford. However, because the Virachacks presumably could have purchased their Explorer with independently obtained credit without forfeiting the rebate, forfeiting that rebate was not a condition of credit but merely a condition of receiving the promotional interest rate. Thus,

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2. These facts were all properly before the district court and University Ford did not dispute them for purposes of summary judgment. (App. 17a.)

the district court held the $2,000 unknowingly forfeited by the Virachacks need not be disclosed as part of the "finance charge" under TILA. (App. 27a-28a.)

The Virachacks timely appealed. The Ninth Circuit, in a split published decision, affirmed. The majority held that because the Virachacks got a "good deal" by obtaining below-market financing, they could not complain of an undisclosed forfeited rebate. (App. 8a.) The majority also found a forfeited rebate is not technically a charge so it need not be disclosed under TILA. (App. 7a.) Finally, the panel majority noted that a "purpose to induce a cash payment" was "critical" to finding a cost to be a "finance charge." (App. 8a.) Because there was no evidence showing the purpose of the rebate was to induce customers to buy with means other than credit, the majority panel found the forfeited rebate was not a "finance charge." (App. 8a.)

Judge Betty B. Fletcher dissented. In her published dissent, Judge Fletcher concluded: "A discount or rebate offered to purchasers paying with cash that is not extended to purchasers using credit is a finance charge." (App. 10a, citations omitted.) Judge Fletcher noted that, under Regulation Z and the Official Staff Interpretation of TILA, a discount offered to those who pay cash, but withheld from those who pay with credit, is a finance charge. (App. 12a.) Judge Fletcher rejected the panel majority's conclusion that an intent to induce a cash payment was "critical" to finding a cost to be a "finance charge" under TILA. Finding a cost to be a "finance charge," according to Judge Fletcher, is an objective legal conclusion. (App. 12a.)

## REASONS FOR GRANTING THE PETITION

### a. Vehicle Purchases Are One of the Most Important Purchases by Americans and Yet Notoriously Fraught With Predatory and Deceptive Ploys by Car Dealers.

A writ of certiorari should issue because this published majority decision will encourage the already-rampant deceptive practices of car dealers in their dealings with unsuspecting consumers. A vehicle is one of the most important and yet complex purchases for every American. Stephen A. Plass, *Bargain Avoidance in a Competitive Bargain Market: The Car Sales Conundrum*, 2 Wyo. L. Rev. 1, 6, 12 (2002). Indeed, consumers spend billions of dollars every year buying cars. Fredrick L. Miller, *Introduction - Consumer Law*, 78 Mi. Bar J. 270 (1999). Apart from buying a home, buying a car is the biggest business deal of a person's lifetime. *Id.*

Yet consumers are almost always victimized by car dealerships and seldom given the information necessary to assess the details or fairness of their purchase. Plass, *supra*, at 11. Car dealers are deft at manipulating information—despite disclosure rules—to escape policing. *Id.* at 10, 35; *see also id.* at 20 ("contracting process can be downright predatory"). The dealer's tried-and-true method is to dupe the consumer into thinking their salesperson or finance officer is working for them to get them the "best deal" possible. *Id.* at 17-19. Even educated professionals, such as lawyers, doctors and accountants, are susceptible to this ploy. *Id.* at n.4.[3] The reality, of course, is the opposite.

3. Ironically, this is precisely what respondent Bob Baker Ford achieved in the Court of Appeals. It convinced the majority panel the Virachacks got "a good deal" on an interest rate so no one should worry about details.

Car dealerships are structured to profit from every aspect of the sale: the vehicle itself and every product and service offered. *Id.* at 14, 34 ("everything a seller does is for profit"); *see also id.* at 38, n.33 (withholding information about manufacturer rebates allows car dealers to increase their profit).

Offering financing is another way dealerships increase their profits. Most car buyers finance their purchase, R. Carter Pate, Michael C. Buenzow, Rishi Sadarangani, *Subprime Auto Finance: The Year of the Bankruptcies*, Am. Banks. Inst. J. (May 1998) at 30, and the vast majority of consumers finance their cars through the dealer. Diana B. Henrighes, *Hidden Charges: A Special Report; Extra Costs on Car Loans Draw Lawsuits*, N.Y. Times (Oct. 27, 2000) at A1. However, consumer protection agencies consistently state it is better to shop for independent financing precisely because of the dealer's deceptive financing practices. *Edmunds 2000 Buyer's Guide: New Car Prices and Reviews*, Vol. N3304 (2000) at 14; *see also Consumer Action Handbook 2001 Edition*, U.S. Gen. Serv. Admin. Fed. Consumer Info. Ctr. (2001). For example, as this Court has recognized, dealers entice buyers with a low interest rate but surreptitiously increase the price of the vehicle to higher than if the buyer had paid cash or had financed at a higher rate. *See Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 366 (1973).

The law tries to protect and inform consumers. However, car dealers often avoid consumer protection rules especially in the "formation" part of the transaction (as compared to the performance and enforcement aspects). Plass, *supra*, at 5. Complaints about auto sales are the number one reported problem for consumers. *Id.* at n.2. Few consumers, however, have the resources or sophistication to bring legal action

over their right to disclosures in an auto purchase contract. *Id.* at 9 ("The paucity of cases in which buyers challenge the formation aspects of car sales transactions attests to the finality with which these deals are made."). Consumers that get to court often find "courts are insensitive to the intimidating and seller-controlled environment in which car deals occur." *Id.* at 15-16.

The majority's decision in this case, allowing car dealerships to hide forfeited rebates in order to sell financing packages, makes the situation for beleaguered consumers exponentially worse. As discussed below, TILA requires disclosure of the true cost of financing a consumer's vehicle. Here, the majority panel of the Ninth Circuit Court of Appeals fell for the car dealer's standard ploy—the court thought the Virachacks got a "good deal" by below-market financing so it refused to find TILA requires disclosure that the price of financing their vehicle was increased by the amount of their forfeited rebate. This is an example of courts failing consumers through a misinterpretation of TILA. Through this petition, this Court has the power to effectuate TILA and return some protection and bargaining power to all Americans on one of the most important and yet potentially abusive purchases of their lives.

**b. Certiorari Should Be Granted Because the Majority Opinion Dangerously Nullifies the Core Purpose of TILA.**

The majority's decision conflicts with TILA's core purpose and case law. It is undisputed the Virachacks will end up paying at least $2,417.47 more by accepting Bob Baker Ford's credit offer than they would have paid by buying the same car with cash. It is also undisputed the Virachacks

did not know this. The Virachacks had no idea of the true cost of their credit—the forfeited $2,000 rebate—until many months after the transaction. This is precisely the lack of information TILA was enacted to prevent and this rule has been confirmed by case law.

TILA's broad purpose is "the informed use of credit" by consumers. 15 U.S.C. § 1601(a). In enacting this legislation, Congress made an express declaration as to TILA's purposes and intent:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in extension of consumer credit would be strengthened by the informed use of credit. *The informed use of credit results from an awareness of the cost thereof by consumers.* It is the purpose of this title [15 U.S.C. §§ 1601, *et seq.*] to assure a *meaningful disclosure* of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and *avoid the uninformed use of credit.* . . .

*Id.* (emphasis added).

Regulation Z, 12 C.F.R. 226.1, is the Federal Reserve Board's regulation implementing TILA. Regulation Z also states TILA's purpose "is to promote the informed use of consumer credit by requiring disclosures about its terms and costs." 12 C.F.R. § 226.1(b).[4] This Court has confirmed the

4. Congress "delegated expansive authority to the [Federal] Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co. v. Milhollin,* (Cont'd)

central purpose of TILA is to provide "the informed use of credit" by requiring "meaningful disclosure of credit terms" to consumers. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 559. Circuit courts confirm TILA is designed to aid unsophisticated consumers so they will not be easily misled as to the total costs of financing, *Thomka*, 619 F.2d at 248, and thereby "to balance scales thought to be weighed in favor of lenders." *Ramadan*, 229 F.3d at 197 (citations omitted).

Circuit law specifically verifies TILA requires all information on the cost of credit be disclosed so the consumer can choose among financing options or to pay cash. *See, e.g.*, *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986) ("Congress through TILA sought to protect consumers' choice through full disclosure and to guard against the . . . uninformed use of credit"); *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 285 (7th Cir. 1997) (TILA's purpose is "to protect consumers from being misled about the cost of credit"); *Travis v. Trust Company Bank*, 621 F.2d 148, 150 (5th Cir. 1980) ("TILA was passed in 1968, after eight years of increasing Congressional concern about consumer ignorance of credit costs"); *Walker v. Wallace Auto Sales*, 155 F.3d 927, 934 (7th Cir. 1998) (finance charge disclosure obligations "must be interpreted in a manner consistent with TILA's purpose of ensuring that consumers are informed fully of the costs of buying on credit").

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(Cont'd)

444 U.S. at 560. "The Board exerted its responsibility by promulgating Regulation Z, 12 C.F.R. Part 226 (1979)," *id.*, which "absent some obvious repugnance to the statute should be accepted by the courts, as should the Board's interpretation of its own regulation." *Anderson Brothers Ford v. Valencia*, 452 U.S. 205 (1981).

Here, the majority decision ignores TILA's purpose by finding Bob Baker Ford was not required to disclose the forfeited rebated as a "cost" of their offered 0.9% APR financing. If Ford's 0.9% APR customers are not informed of their forfeited $2,000 rebate, then those customers are ignorant of the full cost of their credit. Not telling Ford customers the effective $2,000 cost of the offered 0.9% financing means customers are making uninformed credit decisions contrary to TILA, especially in the context of car buying. "The more a buyer knows, the greater his chances of making a fair or reasonable deal." Plass, *supra*, at 32. It turns TILA on its head for the panel majority in this case to decide *ex post facto* that a consumer got a "good deal" on financing so there was no need to tell the consumer what he or she really paid for that financing. TILA and case law mandate such information be disclosed so the *consumer* can choose. This Court should grant certiorari to correct this dangerous decision and erroneous view of TILA.

### C. Certiorari Should Be Granted Because the Majority Opinion Is Contrary to TILA and Conflicts With Other Circuits' Law in Finding the Undisclosed Forfeited Rebate Was Not a "Finance Charge."

TILA specifically requires a creditor to disclose the amount of any "finance charge" to the consumer. 15 U.S.C. § 1632(a). TILA defines "finance charge" broadly. Specifically, a finance charge is "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(a). Regulation Z further describes what is a finance charge:

> It includes any charge payable directly or indirectly by the consumer and imposed directly

> or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge payable in a comparable cash transaction.

12 C.F.R. § 226.4(a).

The majority opinion is contrary to TILA and other circuit law in finding the Virachacks' forfeited rebate was not a "finance charge." It is undisputed the Virachacks were only told their cost of buying their Explorer on credit was $417.47. They were not told about the forfeited rebate. It is also undisputed the Virachacks were required to forfeit a $2,000 rebate "as a condition" to receiving that 0.9% APR financing. Thus, the undisclosed forfeited rebate was indeed a "cost" or "condition" of the Virachacks' credit; specifically under TILA, a "finance charge" that must be disclosed but was not.

The panel majority here supported its decision by finding a forfeited rebate is not a "charge." This is illogical. For example, a forfeited or non-returned rebate after a loan prepayment is a "finance charge" that indeed must be disclosed under TILA. *See St. Germain v. Bank of Hawaii*, 573 F.2d 572, 577 (9th Cir. 1977) (Regulation Z requires "identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full. . . . If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."). Giving up a right to receive money is the same to a consumer as paying money. As this Court has stressed, the cost of credit must be assessed "[f]rom the consumer's point of view." *Mourning*, 411 U.S. at 366 n.26. Here, from the "consumer's point of view," forfeiting a rebate as a condition to financing is the same as a charge for financing.

Regulation Z further defines a finance charge as including a discount to cash purchasers that is not extended to credit purchasers in the same transaction. 12 C.F.R. § 226.4(b)(9). The official Staff Interpretation of Regulation Z explains:

> *Discounts for payment by other than credit.* The discounts to induce payment by other than credit mentioned in § 226.4(b)(9) include, for example, the following situation:
>
> The seller of land offers individual tracts for $10,000 each. If the purchaser pays cash, the price is $9,000, but if the purchaser finances the tract with the seller the price is $10,000. The $1,000 difference is a finance charge for those who buy the tracts on credit.

*Id.*[5]

This Court has also recognized a "finance charge" is often disguised by creditors simply increasing the price for buying the same product on credit:

> One means of circumventing the objectives of the Truth in Lending Act, as passed by Congress, was that of "burying" the cost of credit in the price of

5. To augment Regulation Z, the Federal Reserve Board also issues Official Staff Interpretations. 12 C.F.R. Pt. 226, Supp. I. "Congress . . . delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit," therefore, "absent a clear expression to the contrary" deference is due the Board's interpretations of TILA. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 559-650.

> goods sold. Thus in many credit transactions in which creditors claimed that no finance charge had been imposed, the creditor merely assumed the cost of extending credit as an expense of doing business to be recouped as part of the price charged in the transaction.

*Mourning*, 411 U.S. at 366.

Here, it is undisputed the $2,000 rebate was available to discount an Explorer's price for a customer who paid cash and not available to a customer who financed at 0.9% APR. Regulation Z and its Official Staff Interpretation state a discount to customers that pay with cash but withheld from customers paying with a particular form of credit is a finance charge to those customers paying with that credit.[6] Thus, the $2,000 rebate offered to cash buyers of the Explorer and not offered to the Virachacks due to their financing package makes the forfeited rebate a finance charge as defined by TILA and Regulation Z.

Regulation Z also describes "[d]iscounts for the purpose of inducing payment by a means other than the use of credit" as an example of a finance charge. 12 C.F.R. § 226.4(b)(9). To the extent the majority panel found the forfeited rebate was not a finance charge because Bob Baker Ford stated it had no "motive" to induce a cash purchase, this was error. The statement of purpose in Regulation Z is merely an "example" of what is a finance charge. *Id.* at § 226.4(b).

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6. The term "credit" in TILA's regulatory and statutory scheme is not credit in general; it is the "credit transaction in question." *See* 12 C.F.R. Pt. 226, Supp. 18, 226.4-4(a)(i); *see also Walker*, 155 F.3d at 932.

No law states purpose is a "critical" litmus test for all finance charges under TILA. On the contrary, what is a "finance charge" under TILA is a legal conclusion that must be based on objective criteria.

The majority decision here conflicts with law in other circuits stating a difference between the cash and credit price for a car is indeed a finance charge that must be disclosed under TILA. In *Walker v. Wallace Auto Sales*, 155 F.3d 927 (7th Cir. 1998), plaintiffs alleged the car dealer violated TILA by charging a higher overall price for credit sales than for similar cash sales. The dealership allegedly inflated the prices of cars sold on credit to recover money it lost when the dealership later sold the installment contracts. The Seventh Circuit held TILA requires specific disclosure of this price difference as a cost of credit. To hold otherwise, would "eviscerate TILA's stated purpose to 'assure a meaningful disclosure of the credit terms so that the consumer will be able to compare more readily various credit terms available to him and avoid the uninformed use of credit.'" *Id.* at 934, citing 15 U.S.C. § 1601.

Similarly, in *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000), the Seventh Circuit held the net price difference between cash and credit car sales had to be disclosed under TILA as a part of the finance charge. *Id.* at 851-852. "The Act's purpose is to enable borrowers to determine the cost of credit so that they can decide . . . whether to pay cash or to borrow from or through the seller or from another lender (and thus pay cash to the seller) who may charge a lower interest rate." *Id.*; *see also Gibson*, 112 F.3d 283. Thus, in conflict with the majority decision here, other circuit law confirms if the price of a car is different for

cash purchasers, the difference is a "finance charge" or "cost of credit" that must be disclosed under TILA.[7]

Here, the real cost of deferring payment for the Virachacks included forfeiture of an otherwise available rebate. In terms of TILA, the forfeited rebate was a cost "imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit." Reg. Z., 12 C.F.R. § 226.4(a). Moreover, under Regulation Z and its Official Staff Interpretation, the lost rebate was a "finance charge" because it caused the Virachacks' Explorer to cost more than an Explorer bought with cash or financed at a higher rate. In terms of TILA, the rebate was undisputedly a "discount for cash" not offered to those financing at 0.9% APR. Because this "finance charge" was not disclosed to the Virachacks, the majority panel decision here is contrary to TILA's mandate and conflicts with other circuit law.

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7. District courts in other circuits are also contrary to the Ninth Circuit's majority decision in this case. *See Taylor v. Bob O'Connor Ford, Inc.*, 1998 U.S. Dist. LEXIS (N.D. Il. 1998) (difference between the car price on the purchase order and the higher price listed on the retail installment contract was a finance charge); *Joseph v. Norman's Health Club, Inc.*, 386 F. Supp. 780 (E.D. Mo. 1974), *rev'd on other grounds*, 532 F.2d 86 (8th Cir. 1976) (club members who paid within 45 days got 10% discount; therefore, even though listed selling price was always the same, the undisclosed discount forfeited by those who paid by credit terms constituted a finance charge and had to be disclosed); *see also Van Vels v. Premier Athletic Center of Plainfield, Inc.*, 182 F.R.D. 500 (W.D. Mi. 1998) (form contracts which do not disclose to credit purchasers their loss of a discount available to cash customers violates TILA).

**D. This Court Should Grant Certiorari Now Because This Majority Decision Removes TILA Protections for Many Americans and Yet There Is Little Opportunity to Review These Cases.**

There are only two published cases on the precise issue of whether a car dealer's undisclosed rebate is a finance charge—this decision and a district court decision. *See Coelho v. Park Ridge Oldsmobile*, 247 F. Supp. 2d 1004 (N.D. IL 2003) (forfeited factory rebates need not be disclosed cost of financing where purchaser could have obtained other financing and still qualified for the rebate). This Court cannot wait for a conflict between Courts of Appeals on this precise issue. The Ninth Circuit majority decision in this case is an extremely dangerous precedent—allowing courts to decide paternalistically and after-the-fact that the consumer got a "good deal" so there was no disclosure problem under TILA. This perpetuates car dealers' *modus operandi*: making the public—and also the courts—think the dealer helped the buyer get a good deal so there is no need to know the details. Congress, however, has demanded that the curtain be raised. Telling consumers details—like a forfeited rebate—reveals the actual cost of a too-good-to-be-true interest rate.

It is well-documented abuses like this in car deals are commonplace, but most of the time these ploys go undetected and/or unreported. Plass, *supra*, at 11. Moreover, few consumers have the resources or sophistication to bring to courts problems over lack of disclosure in an auto purchase contract. *Id.* at 9 ("The paucity of cases in which buyers challenge the formation aspects of car sales transactions attests to the finality with which these deals are made.").

To avoid evisceration of TILA's consumer protection in an area fraught with disclosure problems, review by this Court is necessary. This Court should take this unique opportunity to assure TILA is correctly applied to achieve its end of disclosing the true cost of a consumer's credit in the area of vehicle purchases—where consumers need it most.

## CONCLUSION

As explained above, forfeiting the $2,000 rebate was part of the Virachacks' cost of obtaining Ford's 0.9% APR financing. Or, as defined under TILA, forfeiting the $2,000 rebate was "an incident to or a condition of the extension of [their] credit." 15 U.S.C. § 1605(a); *see also* 12 C.F.R. § 226.4(a). This cost of the Virachacks' financing was required to be disclosed under TILA. The panel majority decision, holding the forfeited rebate was not a finance charge and need not be disclosed, is contrary to TILA, Supreme Court authority and other circuit law. Moreover, this published majority decision paves the way for car dealers to continue their already prevalent practice of manipulating financial information for their own profit at the cost of consumers. For these reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 20, 2005**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

No. 03-55852

MALINEE B. VIRACHACK;
RITNARONE T. VIRACHACK,

Plaintiffs-Appellants,

and

RACHELLE HARVEY,

Plaintiff,

v.

UNIVERSITY FORD, dba: Bob Baker Ford,

Defendant-Appellee.

December 10, 2004, Argued and Submitted,
Pasadena, California
May 20, 2005, Filed

**OPINION**

NOONAN, Circuit Judge:

Malinee B. Virachack and Ritnarone T. Virachack (the Virachacks) appeal the district court's grant of summary judgment to University Ford, a California corporation doing

business as Bob Baker Ford, in their action under the Truth In Lending Act (TILA), 15 U.S.C. § 1601 *et seq.* holding that Bob Baker Ford did not fail to disclose the total finance charge, we affirm the judgement of the district court.

## FACTS

On November 18, 2001, the Virachacks bought a Ford Explorer from Bob Baker Ford. The purchase was partly on credit. Bob Baker Ford made the following statement in the Retail Sales Installment Contract executed by the Virachacks,

Federal Truth-In-Lending Disclosure

The contract also stated that the Virachacks would make monthly payments of $ 479.85 for 48 months. The contract also reflected a sales tax of $ 1,748.47, based on the "cash price" of the vehicle of $ 23,268.

According to the affidavit of Nathaniel Torres, the finance manager of Bob Baker Ford, on the day the Virachacks bought the Explorer, Ford Motor Company was offering a $ 2,000 rebate to certain customers buying that model and year vehicle, but was not offering this rebate to customers buying on credit at the 0.9% rate. The availability of the rebate also depended, in part, on the geographical area in which the customer resided. The possibility of the rebate was not mentioned in the "Federal Truth-In-Lending Disclosure" of the contract. According to Torres, had the Virachacks "desired a factory rebate and financing through Bob Baker Ford, they could have entered into a retail installment contract with Bob Baker Ford at a non-promotional interest rate offered by Ford Motor Credit Company, or they could have entered into a retail installment contract with Bob Baker Ford at whatever interest rate, promotional or not, was offered by any one of the other banks or finance companies to whom we regularly sell contracts."

## PROCEEDINGS

The present suit began as a class action in the Superior Court for the County of San Diego. Bob Baker Ford transferred it to the district court. By stipulation of the parties, the Virachacks were substituted for the original plaintiff, who was discovered to have entered a transaction with Bob Baker Ford where the rebate option was not available. The

Virachacks alleged that the $ 2,000 cash rebate they might have received if they had paid cash should have been disclosed as part of the finance charge and that the failure to disclose violated the TILA, 15 U.S.C. § 1638(a)(2), (3), (4), and (5). They sought for themselves and for each member of the plaintiff class damages not to exceed the statutory maximum of the lesser of $ 500,000 or 1% of the defendant's net worth. *Id.* at § 1640(a)(2)(B).

After discovery, each side moved for summary judgment. Granting summary judgment to Bob Baker Ford, the district court stated:

> The reality of plaintiffs' transaction is that they were given a "discount" on the market interest rate in order to induce them to purchase their vehicle. Indeed, plaintiffs' own separate statement of facts posits that the promotional rate is below the market interest rate. The cash rebate is not a cost of credit imposed upon plaintiffs. Rather, the rebate is an option made available to both cash and credit purchasers in order to induce the purchase of Ford vehicles at a price that would otherwise be unavailable to those consumers. In essence, the promotional interest rate is simply a different form of the cash rebate in that both the rebate and the interest rate are forms of subsidizing the market price of the vehicle offered to consumers in order to generate sales. Thus, the rebate is a "discount" made available to consumers who wish to receive the promotional interest rate but in the form of the reduced APR rather than in

> cash. Therefore, plaintiffs have received the "discount" made available to cash and other credit purchasers illustrating that the forgone rebate is not a condition of the extension of credit. *See* 12 C.F.R. Pt. 226, Supp. I, Comment 4(*a*)(i)(B) (discount available to both cash and credit consumers not a finance charge). Consequently, the record does not support plaintiffs' argument that the forgone rebate is imposed as a condition of the extension of credit or that the rebate is being offered to induce purchases by means other than credit. Therefore, the court concludes that the cash rebate is not part of plaintiffs' cost of credit and need not be disclosed.

*Virachack v. Univ. Ford*, 259 F. Supp. 2d 1089, 1091 (S.D. Cal. 2003).

The Virachacks appeal.

## ANALYSIS

The case is governed by a statute with a broad purpose, "the informed use of credit" by consumers. 15 U.S.C. § 1601(a). The statute's carefully drawn terms are rendered even more precise by the regulations issued by the Federal Reserve Bank, the agency entrusted with the implementation of this law.

The statute defines "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or

indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction." 15 U.S.C. § 1605(a).

The statutory definition does not embrace a rebate that is withheld. A charge is a request for payment. A rebate is a reduction in payment. It is to turn topsy-turvy to contend that a rebate that is not given is a hidden charge.

The Virachaks' case looks less implausible under Regulation Z of the Federal Reserve Bank. This authoritative interpretation of the statute lists among examples of finance charges the following: "Discounts for the purpose of inducing payments by a means other than the use of credit." FRB Regulation Z, 12 C.F.R. § 226.4(b)(9) (2004). How can a discount be a charge? It cannot be. What the Federal Reserve Bank means is that the presence of a discount for a cash transaction is an index that more is being charged for a credit transaction. The Virachacks contend that a rebate for cash on the purchase price is functionally the same as a discount for cash. The rebate is an index that more is being charged for credit. They refer to the Official Staff Commentary on the regulations:

> The seller of land offers individual tracts for $10,000 each. If the purchaser pays cash, the price is $ 9,000, but if the purchaser finances the tract with the seller the price is $ 10,000. The $ 1,000 difference is a finance charge for those who buy the tracts on credit.

*Appendix A*

Commentary to Fed. Reserve Bd. Reg. Z, 12 C.F.R. part 226 Supp. I 374 para. 4(b)(9)

The preceding example treats the discount as evidence of purpose to induce payment in cash.

The question for decision, then, is whether the $ 2,000 rebate was offered to induce customers to use means other than credit. The declaration of Nathaniel Torres is that inducement to pay with means other than credit was not the purpose of the offer. Although an employee of Bob Baker Ford, Torres acted as the agent of Ford Motor Company so far as the availability of the rebate was concerned and so may be relied on in his statement that the rebate would have been offered to the Virachacks if they had sought to buy on credit but not at the extraordinarily low rate of 0.9%. If we accept Torres's unchallenged account of the facts, Ford Motor Company denied the rebate only because the manufacturer did not want to offer two incentives to the same customer. According to Torres, the $ 2,000 rebate is not an index of a hidden credit charge but simply a subsidy from the manufacturer that was available only to those not getting the subsidized interest rate. The element of a purpose to induce a cash payment — the element critical to the Virachacks' case — is absent.

This account is confirmed by two facts also furnished by Torres. Bob Baker Ford did not determine eligibility for the rebate. If a rebate had been offered, the price of the vehicle for sales tax purposes would not have been affected; the tax would have been paid on the price before the rebate. The price is therefore the same on credit or cash terms.

*Appendix A*

The Virachacks complain that, not being told of the possibility of the rebate in the "Federal Truth-In-Lending Disclosure," they never got to choose; that they, therefore, were not the informed users of credit that the federal law seeks to assure. Compliance with the TILA did not require them to be informed to this extent. They got a good deal. Seeking to get a windfall, they cannot get more than the statute and its regulations afford them.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

| **ANNUAL PERCENTAGE RATE** | **FINANCE CHARGE** | **Amount Financed** | **Total of Payments** | **Total Sale Price** |
|---|---|---|---|---|
| The cost of your credit as a yearly rate. | The dollar amount the credit will cost you. | The amount of credit provided to you or on your behalf | The amount you will have paid after you have made all payments as scheduled. | The total cost of your purchase, including your down payment of $ 4303.14 is |
| 0.90% | $ 417.14 (e) | $ 22615.33 | $ 23032.80 (e) | $ 27335.94 (e) |

(e) = estimate

*Appendix A*

## DISSENT

B. FLETCHER, Circuit Judge, dissenting:

The majority affirms the district court's summary judgment dismissal of the Virachacks' claim under the Truth in Lending Act ("TILA"), concluding their foregone rebate was not a finance charge. I respectfully dissent. A discount or rebate offered to purchasers paying with cash that is not extended to purchasers using credit is a finance charge. *See* F.R.B. Regulation Z, 12 C.F.R. § 226.4(b)(9) ("Regulation Z").

The Appellants, Malinee B. Virachack and Ritnarone T. Virachack, purchased a Ford Explorer from the Appellee, University Ford d/b/a Bob Baker Ford, the dealer and creditor. The Virachacks purchased the Explorer on a credit plan negotiated with Bob Baker Ford. The credit plan had an Average Percentage Rate ("APR") of 0.9%. To receive this APR, customers including the Virachacks had to forego a $ 2,000 manufacturer's rebate offered by Ford Motor Company ("Ford Motor") for the purchase of its Explorer. The $ 2,000 manufacturer's rebate was offered to all other customers purchasing an Explorer paying either cash or credit. The Virachacks argue the foregone rebate was a finance charge. As such, they argue the $ 2,000 increase in cost incurred by financing at 0.9% APR should have been disclosed to them under TILA.

A finance charge is defined by TILA "as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by

the creditor as an incident to the extension of credit." 15 U.S.C. § 1605(a). Bob Baker Ford argues the foregone rebate was not a finance charge requiring disclosure under TILA. The district court agreed and the majority opinion affirms.

As a general matter, discounts to purchasers using cash that are not extended to purchasers using credit are treated as finance charges. *See* 12 C.F.R. § 226.4(b)(9). Regulation Z[1] specifically lists "Discounts for the purpose of inducing payment by a means other than the use of credit" under examples of finance charges. *Id.* To further explain this principle the official staff interpretation states:

> *Discounts for payment by other than credit.* The discounts to induce payment by other than credit mentioned in § 226.4(b)(9) include, for example, the following situation:
>
> The seller of land offers individual tracts for $ 10,000 each. If the purchaser pays cash, the price

1. Regulation Z, 12 C.F.R. § 226, is the Federal Reserve Board's regulations implementing the Truth in Lending Act. Its purpose "is to promote the informed use of customer credit by requiring disclosures about its terms and costs." *Id.* at § 226.1(b). To augment Regulation Z the Board also issues Official Staff Interpretations. 12 C.F.R. Pt. 226, Supp. I. The Supreme Court has said that because "Congress . . . delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit" that "absent a clear expression to the contrary" deference is due the Board's interpretations of TILA. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980).

> is $ 9,000, but if the purchaser finances the tract with the seller the price is $ 10,000. The $ 1,000 difference is a finance charge for those who buy the tracts on credit.

12 C.F.R. Pt. 226, Supp. 1 § 226.4-4(b)(9)(i). A discount offered to customers that pay in cash but withheld from customers paying with a particular form of credit is considered a finance charge to those customers paying with the particular form of credit.[2] Withholding the rebate from these customers is necessarily a discount for the purpose of inducing payment by other means. This is a legal conclusion. A creditor's testimony on why he or she believes the rebate is withheld from customers paying with a particular form of credit is not pertinent to this consideration. The result of withholding the rebate is a discount to cash paying customers as contrasted to customers paying with the 0.9% APR plan.

The example used in the official staff interpretation of land being sold for $ 10,000 to purchasers using credit and for $ 9,000 to purchasers using cash is analogous to the Virachacks' transaction. If the Virachacks had paid cash for their Ford Explorer they would have received the $ 2,000 rebate. But under the credit plan with 0.9% APR they were denied the rebate and as a result paid $ 2,000 (plus interest on the $ 2,000 loaned) more for their car than a cash purchaser. Ford Explorers sold to purchasers paying cash cost

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2. Credit cards and other forms of open-ended credit are exempt from this rule. *See* 15 U.S.C. § 1666f(b). The Virachacks' financing is a closed-end credit plan. *See* 12 C.F.R. § 226.2(a)(10) (defining closed-end credit); 12 C.F.R. § 226.2(a)(20) (defining open-end credit).

at least $ 2,000 less than the same car sold to purchasers paying with the 0.9% APR credit plan.

The Virachacks are not requesting a "windfall" as the majority opinion suggests. Maj. op. at 5474. Rather they simply want to be fully informed, as TILA requires, of the full costs of paying with the 0.9% APR credit plan. The credit plan extended to the Virachacks cost them $ 2,000 (plus interest) more than paying with cash would have cost them.

The district court found the foregone $ 2,000 rebate was not a finance charge.[3] The district court reasoned that the $ 2,000 rebate was available to people who paid with either cash or credit. The only group excluded from the $ 2,000 rebate was composed of people who paid with the 0.9% APR financing. The district court's flawed reasoning was as follows, "Simply put, a consumer may obtain the rebate and still purchase on independently obtained credit. Forgoing the rebate, then, is not a condition of the extension of credit but, instead, is merely a condition of receiving the promotional rate."

The problem with this reasoning is that although forgoing the $ 2,000 rebate was not a cost for all purchasers using credit, it was a cost for all purchasers using Bob Baker Ford's 0.9% APR financing plan. The official staff interpretation of Regulation Z explains that when determining whether a charge is a finance charge one should look at the

3. The district court in *Virachack* adopted the reasoning of the only other federal court opinion on this issue *Coelho v. Park Ridge Oldsmobile, Inc.*, 247 F. Supp. 2d 1004 (D. Ill. 2003). No federal court of appeals has yet ruled on this issue.

particular credit transaction at issue. 12 C.F.R. Pt. 226, Supp. 1 § 226.4-4(a)(1). The staff interpretation states "charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare *the credit transaction in question* with a similar cash transaction." *Id.* (emphasis added). This requires "the credit transaction in question" to be compared with a cash transaction. *Id.* If one compares the Virachacks' transaction with a cash transaction for a Ford Explorer then the Virachacks paid $ 2,000 (plus interest) more for their car than a cash purchaser would have paid.

At the time the Virachacks purchased their car, receiving the 0.9% APR credit required a purchaser to forego the $ 2,000 rebate. This was not a negotiable aspect of the sale. Persons receiving the 0.9% APR forfeited the rebate. Individuals paying cash or with other forms of credit were eligible for the rebate. Thus, in this case, the $ 2,000 rebate was withheld "as an incident to or as a condition of the extension of credit." 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4(a). Foregoing the $ 2,000 credit was a cost of receiving Bob Baker Ford's 0.9% APR financing. The district court erred by comparing purchasers using credit as a general group to purchasers using cash. The fact that the Virachacks could seek other financing is irrelevant. When examining the costs of the credit terms offered, the appropriate comparison is between purchasers using the specific type of credit at issue and purchasers paying with cash. In this case, such a comparison reveals that the Virachacks and similarly situated customers paid $ 2,000 (plus interest) more for their vehicle than a cash purchaser paid for the same vehicle. This

price differential for using the 0.9% APR financing was not disclosed to the Virachacks.

The central purpose of TILA is to provide "the informed use of credit" by requiring "meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980). If Ford Motor gives a rebate to every Bob Baker Ford customer buying a Ford Explorer but withholds the rebate from those customers financing at 0.9% then the foregone rebate is a cost to the latter group of customers. If 0.9% APR customers are not informed of the $ 2,000 rebate then they are ignorant of the full cost of the credit. This conflicts with the explicitly stated purpose of TILA:

> It is the purpose of this subchapter [15 U.S.C. § 1601 *et seq.*] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601(a). Not disclosing the $ 2,000 cost of the 0.9% financing means customers are making uninformed credit decisions. I believe the failure of Bob Baker Ford to disclose the foregone rebate violates TILA. I would reverse.

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED APRIL 30, 2003

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CASE NO. 02 CV 0139 JM (JFS)

MALINEE B. VIRACHACK, et al.,

Plaintiffs,

vs.

UNIVERSITY FORD dba BOB BAKER FORD,

Defendant.

April 29, 2003, Decided
April 30, 2003, Filed

**OPINION**

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

### I. INTRODUCTION

Plaintiffs Malinee and Ritnarone Virachack have filed this class action on behalf of themselves and others similarly situated alleging violations of the Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, by the defendant

automobile dealer Bob Baker Ford. The parties have filed cross-motions for summary judgment.[1] The dispositive issue before the court is whether a car dealership must disclose to the consumer a withheld manufacturer's rebate which is available to cash and credit purchasers but unavailable to consumers who receive a promotional annual percentage rate of interest ("APR"). Pursuant to Local Rule 7.1(d)(1), the court finds these motions appropriate for decision without oral argument.

## II. BACKGROUND

The essential relevant facts are undisputed.[2] In November 2001, plaintiffs[3] entered into a Retail Installment Sales Contract and purchased a new Ford Explorer for a stated price of roughly $ 20,000 (excluding tax, license, dock fees, etc.) at a stated APR of 0.9%. Under this stated APR, defendant

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1. The First Amended Complaint ("FAC") alleges a single cause of action under 15 U.S.C. 1601 *et seq.*, specifically alleging violations of 15 U.S.C. § 1631(a) by defendant's failure to accurately make the disclosures required 15 U.S.C. § 1638(a)(2)-(5). Defendant seeks summary judgment on the entire case while plaintiffs seek summary adjudication on the issue of liability under TILA.

2. Defendant responds to a number of facts in plaintiffs' statement of undisputed facts by stating that the fact is disputed but that the dispute is immaterial to the issue before the court. Consequently, the court concludes that such "disputed" facts are immaterial for purposes of the motions before the court.

3. The term "plaintiffs" for purposes of this motion refers to the named class representatives, Malinee and Ritnarone Virachack.

disclosed to plaintiffs that they incurred a total finance charge of approximately $ 417.

In order to receive the 0.9% APR, plaintiffs were required to agree to the assignment of the contract to Ford Motor Credit Company ("FMCC"). At the time of the execution of the contract, both plaintiffs and defendant intended that the contract be assigned to FMCC, and it is undisputed defendant did not inform plaintiffs that they would have received a $ 2,000 rebate from Ford Motor Company ("Ford") had they paid cash for the Explorer. Plaintiffs could not receive both the rebate and the 0.9% APR. Plaintiffs, however, could have received the manufacturer's $ 2,000 rebate and independently financed the purchase of the vehicle had they not received the promotional 0.9% APR.

In summary, defendant made the following TILA disclosures:

| | |
|---|---|
| (1) APR— | 0.9% |
| (2) FINANCE CHARGE— | $ 417.47 |
| (3) AMOUNT FINANCED— | $ 22,615.53 |
| (4) TOTAL OF PAYMENTS— | $ 23,032.80 |
| (5) TOTAL SALE PRICE— (includes down payment of approximately $ 4,000) | $ 27,335.94 |

*Appendix B*

## III. DISCUSSION

A court may grant summary judgment when there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). Additionally, summary adjudication is appropriate on discrete claims where no genuine issues of material fact exist as to that claim. Fed. R. Civ. P. 56(a). Neither party raises any genuine issue of material fact making summary judgment on the claimed violation of TILA appropriate in this case.

Congress enacted TILA based on the findings that free-market competition and the economy would be strengthened through the informed use of credit which, in turn, "results from an awareness of the cost thereof by consumers." 15 U.S.C. § 1601(a). Congress explicitly set forth the purpose of TILA in the Act:

> It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

*Id.*; *see also Mourning v. Family Pubs. Service, Inc.*, 411 U.S. 356, 364-65, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973) (TILA intended to prevent creditors from obscuring the cost

of credit to consumers). As the Supreme Court has explained, "*meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure and the need to avoid information overload.'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980) (quoting S. Rep. 96-73, p. 3 (1979)) (emphasis in original). In other words, the evaluation of a credit transaction should focus on "the economic substance of the transaction." *Williams v. Chartwell Financial Services, Inc.*, 204 F.3d 748, 753 (7th Cir. 2000). Furthermore, due to the inherent complexity in striking a meaningful balance, Congress granted the Federal Reserve Board ("FRB") "expansive authority . . . to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co.*, 444 U.S. at 560. Consequently, "traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in setting the statutory machinery in motion." *Id.* at 566 (citations omitted) (holding courts must defer to Federal Reserve Board staff opinions construing TILA or the underlying regulations unless such opinions are "demonstrably irrational").

In this case, the parties dispute whether TILA requires a car dealership to disclose a manufacturer's rebate that is unavailable to credit consumers buying at a promotional APR but available to cash consumers and credit consumers who receive an APR other than the promotional rate. More specifically, the issue is whether the forgone rebate is a "finance charge" under TILA, i.e., a charge imposed incident to the extension of credit, due to the fact that the rebate is

withheld from credit consumers who receive the promotional APR. Initially, the court notes that neither party presents any statute, regulation, or official comment directly on point.[4]

As in any case of statutory and regulatory construction, the court begins its analysis with the text of the relevant statutes and regulations at issue. Under 15 U.S.C. § 1632(a), a creditor is required to disclose the amount of any "finance charge" clearly and conspicuously to the consumer. 15 U.S.C. § 1632(a). In turn, § 1605(a), broadly defines what constitutes a finance charge subject to disclosure:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.

---

4. Defendants argue that the Comment 18(b)(2) explicitly allows a creditor to ignore manufacturer's rebates under TILA. However, the comment, inter alia, only addresses rebates *offered* to consumers and does not address the situation before the court. See 12 C.F.R. Pt. 226, Supp. I, Comment 18(b)(2). Where the rebates are offered to purchasers on credit, there is no question that the rebate is not part of the cost of credit since it is given *in addition* to financing. In contrast, the withholding of a manufacturer's rebate gives rise to the argument that a rebate was part of the cost of extending credit to a particular purchaser. Therefore, the comment does not support defendant's argument that the FRB has determined that a manufacturer's rebate may be ignored wholesale under TILA no matter what the circumstances.

15 U.S.C. § 1605(a). In keeping with the text of § 1605(a), the FRB, in Regulation Z (12 C.F.R. § 226.4(a)), also defines what constitutes the finance charge:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

12 C.F.R. § 226.4(a). In addition, 12 C.F.R. § 226.4 list specific examples of finance charges including "discounts [made] for the purpose of inducing payment by a means other than the use of credit." 12 C.F.R. § 226.4(b)(9). However, the official comments to this section state that discounts which are offered to both cash and credit purchasers are not included as part of a finance charge. 12 C.F.R. Pt. 226.4, Supp. I, Comment 4(a)(1)(i)(B).

With this statutory scheme in mind we turn to the contentions of the parties. In order to prevail, plaintiffs must establish that the rebate in question meets the four elements that prove a finance charge under 15 U.S.C. § 1605(a). This means that the rebate must be (1) a charge, (2) directly or indirectly payable by the consumer, (3) imposed directly or indirectly by the creditor, and (4) as an incident or condition of the extension of credit. 15 U.S.C. § 1605(a); *see also* 12 C.F.R. § 226.4(a). While the parties contest the applicability of various portions of the definition to the rebate withheld in this case, the court finds that the forgone rebate

was not withheld incident to or as a condition of the extension of credit to plaintiffs and is therefore dispositive. Accordingly, the court does not reach the other portions of the definition addressed by the parties.

At the threshold, plaintiffs argue the undisclosed rebate constitutes a finance charge. Plaintiffs' premise is that the cost of credit to them is greater than the 0.9% APR disclosed since it fails to account for the $ 2,000 rebate that they must forgo in order to purchase at that specific rate. Plaintiffs maintain that the forgone $ 2,000 rebate was imposed as a condition of the extension of credit at the 0.9% rate and is thus hidden within the price of the vehicle either by defendant directly or indirectly based on the required assignment of the loan to Ford Motor Credit Company. Instead of receiving a 0.9% APR, plaintiffs argue that the hidden cost of the forgone $ 2,000 rebate would, if revealed, demonstrate that their credit purchase was made at a substantially higher APR (in this case 4.6%). Because the purpose of TILA is to inform purchasers of the actual cost of credit, plaintiffs urge the court to view the forgone rebate as a "hidden" finance charge buried in the price of the vehicle. In support, plaintiffs argue that this case is essentially indistinguishable from the decision in *Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927 (7th Cir. 1998), since plaintiffs, like those in Walker, are required to pay a higher "cash" price to purchase on credit.

In Walker, the plaintiffs purchased a Lincoln Continental at a listed cash price of $ 14,040 from the defendant auto dealer. *Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927, 929 (7th Cir. 1998). According to the "Blue Book" used car guide, the car had a retail value of $ 8,300. The plaintiffs paid

$ 1,500 as a down payment leaving $ 13,300 to be financed at a 25% APR over four years. As a result, the plaintiffs were to pay $ 7,868 in interest causing the total sale price to be $ 21,168. After the sale was complete, the defendant sold the contract to Guardian, a named defendant, who specialized in purchasing retail sales contracts from auto dealers. Guardian purchased plaintiffs' contract at a $ 7,182 discount from the sale price paid by plaintiffs to the auto dealership. *Id.*

The plaintiffs filed suit alleging that the auto dealer had "artificially inflated the cost of the vehicle to cover the discount at which Guardian purchased the [plaintiffs'] sales contract and therefore imposed a 'hidden finance charge' on them in violation of TILA, 15 U.S.C. § 1638(a)(3)." *Walker*, 155 F.3d at 929. The district court dismissed the complaint relying upon the Official Staff Commentary which provided that "[a] discount imposed on a credit obligation when it is assigned by a seller-creditor to another party is not a finance charge as long as the discount is not separately imposed on the consumer." *Id.* at 930 (quoting 12 C.F.R. Pt. 226, Supp. I, Comment 4(a)(2)).

The Seventh Circuit reversed. The court explained that TILA required a creditor to disclose the cost of credit for the purchase of a good. It reasoned that the discount given to Guardian, as alleged in the complaint, and imposed on a purchaser buying on credit was a finance charge under TILA:

> credit customers, such as [plaintiffs], are paying higher "cash" prices only because they are buying on credit. The higher cash price paid by these

> customers is therefore part of the cost of buying on credit. Under TILA, such a cost is a finance charge and must be disclosed to the consumer as such.

*Walker*, 155 F.3d at 932. The court also rejected the district court's reasoning that the discount was not "separately imposed" simply because the discount given to Guardian was included in the price of the car. To endorse such a definition would, the court reasoned, eviscerate TILA since a creditor could impose finance charges by simply including them in the "cash" price of the car when, in fact, cash purchasers paid less for the car. Consequently the court held that "a charge should be considered 'separately imposed' on a credit consumer when it is imposed in credit transactions but not in cash transactions." *Id.* at 934.

In contrast, defendants argue, inter alia, that Walker is distinguishable because plaintiffs do not forgo the rebate, i.e., incur additional costs, due *solely* to their decision to finance the purchase of their car. This brings us to the core issue of this case. Is the forgone rebate a mandatory condition of the extension of credit? Plaintiffs argue that the answer is a definitive "yes," while acknowledging they could have purchased on credit, albeit at a different rate, and received the rebate at issue. Plaintiffs maintain, however, that the forgone rebate must be considered a finance charge because it was a condition of the extension of credit at the 0.9% promotional rate.

Contrary to plaintiffs' assertions, no "hidden" finance charge is being imposed upon plaintiffs simply because they

were not informed of the cash rebate.[5] Simply put, a consumer may obtain the rebate and still purchase on independently obtained credit. Forgoing the rebate, then, is not a condition of the extension of credit but, instead, is merely a condition of receiving the promotional rate. Therefore, unlike *Walker*, no higher "cash" price was imposed on plaintiffs *solely* because plaintiffs purchased on credit or to mask a portion of the credit. Rather, plaintiffs simply had to forgo the rebate in order to take advantage of the promotional rate.[6] Moreover,

5. While there is no dispute that plaintiffs were not aware of the withheld rebate, the court finds it somewhat incredulous that plaintiffs simply had no idea that a manufacturer's rebate was being given to consumers in the alternative to the promotional rebate. Plaintiffs' argument that this case involves some type of "shell" game between defendant, Ford Motor Company, and Ford Motor Credit Company in an attempt to impose a "hidden" charge itself appears to be somewhat "manufactured." Undoubtedly, consumers are inundated with car advertisements, through all forms of media, and have car advertisement information available to them literally at a finger's touch in this age of the internet. Consequently, the court is highly skeptical of plaintiffs' allegations that defendant was involved in a scheme to keep them "in the dark" concerning the options available to them for purchasing a vehicle. In any event, plaintiffs awareness, or unawareness, of the rebate is immaterial since TILA disclosures do not depend upon the consumer's subjective knowledge.

6. Walker is also distinguishable because plaintiffs are not paying a higher "cash" price as that term is defined by the regulations. The Federal Reserve Board has defined the cash price to mean "the price at which a creditor, in the ordinary course of business, offers to sell for cash the property or service that is the subject of the transaction." 12 C.F.R. § 226.2(a)(9). Here, defendant receives the

(Cont'd)

presumably there would have been no bar to plaintiffs attempting to negotiate a lower purchase price through further negotiations for dealer discounting.

The reality of plaintiffs' transaction is that they were given a "discount" on the market interest rate in order to induce them to purchase their vehicle. Indeed, plaintiffs' own separate statement of facts posits that the promotional rate is below the market interest rate. The cash rebate is not a cost of credit imposed upon plaintiffs. Rather, the rebate is an option made available to both cash and credit purchasers in order to induce the purchase of Ford vehicles at a price that would otherwise be unavailable to those consumers. In essence, the promotional interest rate is simply a different form of the cash rebate in that both the rebate and the interest rate are forms of subsidizing the market price of the vehicle offered to consumers in order to generate sales. Thus, the rebate is a "discount" made available to consumers who wish to receive the promotional interest rate but in the form of the reduced APR rather than in cash. Therefore, plaintiffs have received the "discount" made available to cash and other credit purchasers illustrating that the forgone rebate is not a condition of the extension of credit. *See* 12 C.F.R. Pt. 226, Supp. I, Comment 4(a)(i)(B) (discount available to both cash

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(Cont'd)

same amount for the sale price of the car regardless of whether the purchaser receives the promotional rate or the cash rebate. The record clearly shows that the rebate *may* be assigned to defendant by the purchaser but need not necessarily be assigned towards the purchase price. Consequently, the rebate is not reduction of the purchase price showing that plaintiffs do not pay a higher "cash" price than other purchasers.

and credit consumers not a finance charge). Consequently, the record does not support plaintiffs' argument that the forgone rebate is imposed as a condition of the extension of credit or that the rebate is being offered to induce purchases by means other than credit. Therefore, the court concludes that the cash rebate is not part of plaintiffs' cost of credit and need not be disclosed.

## IV. CONCLUSION

In summary, the plaintiffs were not required to forgo the cash rebate as an incident to or a condition of the extension of credit. Therefore, the cash rebate does not fall within the definition of a finance charge, and need not be disclosed under TILA.

For the foregoing reasons, the court **grants** defendant's motion for summary judgment and **denies** plaintiffs' motion for partial summary judgment. The clerk is instructed to close the file.

**IT IS SO ORDERED.**

DATED: 4/29, 2003

**JEFFREY T. MILLER**

United States District Judge

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 6, 2005

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55852

D.C. No.
CV-02-00139-JTM(JFS)
Southern District of California
San Diego

MALINEE B. VIRACHACK; et al.,

Plaintiffs - Appellants,

and,

RACHELLE HARVEY,

Plaintiff,

v.

UNIVERSITY FORD, dba: Bob Baker Ford,

Defendant - Appellee.

### ORDER

Before: B. FLETCHER, NOONAN, and PAEZ, Circuit Judges

*Appendix C*

The majority of the panel has voted to deny the petition for rehearing. Judge Paez has voted to deny petition for rehearing en banc and Judge Noonan recommended denying the petition for rehearing en banc.

Judge Fletcher would grant the petition for rehearing and recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

Supreme Court, U.S.
FILED
DEC - 6 2005
OFFICE OF THE CLERK

No. 05-573

# In The Supreme Court of the United States

MALINEE B. and RITNARONE T. VIRACHACK,

*Petitioners,*

v.

UNIVERSITY FORD d/b/a BOB BAKER FORD,
a California corporation,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION FOR REVIEW

To stimulate vehicle sales, a car buyer may be offered a financial incentive. The incentive may be a cash rebate. Or it may consist of promotional, reduced rate financing. Sometimes the car buyer may choose between these alternative forms of sales incentive, obtaining either a cash rebate or promotional rate financing, but not both.

If the buyer selects the promotional rate financing incentive, must the cash rebate (that the buyer did not choose) be included in the "finance charge" and "annual percentage rate" for Truth-in-Lending Act purposes?

## PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to this case.

## CORPORATE DISCLOSURE STATEMENT

Respondent's full corporate name is University Ford. It does business under the fictitious name Bob Baker Ford. University Ford is not owned by any parent corporation. No publicly held corporation owns 10% or more of University Ford's stock.

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## BRIEF IN OPPOSITION

Respondent University Ford respectfully submits that plaintiffs' petition for a writ of certiorari should be denied for the reasons stated below.

## STATEMENT OF THE CASE

In November 2001, the Virachacks bought a Ford Explorer from University Ford, an independent car dealer.[1]

At that time, car buyers were offered alternative incentives to boost sales of Ford Explorers. The car buyer could choose between a $2,000 factory rebate[2] or 0.9% financing[3] but could not have both.

Purportedly unaware of the cash rebate alternative,[4] the Virachacks received 0.9% financing on their Ford

[1] Neither Ford Motor Company nor its finance subsidiary, Ford Motor Credit Company, has any ownership interest in University Ford.

[2] Ford Motor Company pays cash rebates directly to the car buyer, or to the dealer if the buyer assigns the rebate to the dealer. Regardless of the rebate, the dealer charges, receives, and computes sales tax on the same car price that it independently negotiates with the car buyer.

[3] Ford Motor Company is not licensed to lend to car buyers. So, it made the 0.9% financing incentive available by paying its finance subsidiary, Ford Motor Credit Company, to buy conditional sales contracts, written at that promotional rate, from car dealers. Assured the contracts could be sold, car dealers were then willing to enter into conditional sale contracts with qualified buyers at the promotional 0.9% rate.

[4] Whether the Virachacks were ignorant of the cash rebate alternative is irrelevant. They do not claim that University Ford defrauded them by failing to mention the cash rebate, that they would have chosen the cash rebate if they had known of it, or that they would have benefited more from a cash rebate than they did from the 0.9%

(Continued on following page)

Explorer. University Ford wrote their conditional sale contract at that promotional rate and immediately assigned the contract to Ford Motor Credit Company.

Had the Virachacks chosen the cash rebate option instead, they could still have financed their purchase with University Ford. However, the conditional sale contract would then have been written at the normal, non-promotional rate, not at 0.9%.

University Ford gave the Virachacks the required Truth-in-Lending Act ("TILA") disclosures. *See* Pet. 3a. The disclosed annual percentage rate ("APR") was 0.9% and the disclosed finance charge was $417.14. Neither figure included the $2,000 cash rebate that the Virachacks did not receive.

This suit was originally filed in state court. Defendant removed it to federal court under 28 U.S.C. §§1331, 1441. The complaint alleges a single cause of action, asserting that University Ford violated TILA by failing to include the alternative cash rebate in the disclosed finance charge and APR. After discovery, the parties filed cross-motions for summary judgment. The district court granted University Ford's motion, denied the Virachacks', and accordingly entered judgment in University Ford's favor. Pet. 16a, 28a.

On appeal, the Ninth Circuit affirmed. Pet. 1a. Judge Betty Fletcher dissented. Pet. 10a. The Virachacks' rehearing petition was denied. Pet. 29a.

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financing they received. University Ford's disclosure obligations under the Truth-in-Lending Act are unaffected by the Virachacks' knowledge or ignorance of the cash rebate alternative.

## *REASONS FOR DENYING THE WRIT*

The petition for certiorari should be denied. There is no conflict among the lower federal courts on the issue raised by this case. That issue arises only in the context of manufacturer incentives for car sales. No broader question of TILA's meaning or application is involved.

The Federal Reserve Board ("FRB") has not deemed the issue of sufficient importance or in such doubt as to require a specific administrative response by regulation, staff commentary or other means.

The Court should not rush to resolve the issue now without administrative guidance or further consideration of the issue by the lower courts. The FRB should be allowed to apply its expertise in deciding whether further disclosure is required or desirable, and if so, how it can be coordinated with other disclosures that TILA requires. Resolution of the issue by prospective administrative guidelines is also preferable to imposition of retrospective statutory penalties by judicial decision.

Contrary to the Virachacks' assertions, the Ninth Circuit's opinion will not encourage deceptive practices by car dealers or nullify TILA's core purposes. The Court does not grant certiorari to edit lower court opinions.

### I. There Is No Conflict Among The Lower Courts Regarding Disclosure Of Alternative Sales Incentives

There is no conflict among lower court decisions on the issue that the Virachacks raise for this Court's review.

As the Virachacks concede, Pet. 18, there are only three published lower court opinions addressing that

precise issue: the opinions of the two lower courts in this case and *Coelho v. Park Ridge Oldsmobile*, 247 F.Supp.2d 1004 (N.D. Ill. 2003). All three hold, contrary to the Virachacks' argument, that a forgone alternative sales incentive is not a "finance charge" for TILA purposes and thus need not be disclosed as such or included in the APR.

The Ninth Circuit's decision does not conflict with *Walker v. Wallace Auto Sales*, 155 F.3d 927 (7th Cir. 1998), *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000), or with the district court opinions cited at page 17 footnote 7 of the petition. None of those decisions dealt with the precise issue raised here: how to disclose alternative manufacturer sales incentives.

In *Walker*, *Balderos*, and the cited district court cases, the seller/creditor charged a higher price for goods sold on credit than for the same goods when purchased with cash. That is not what happened in this case.

The $2,000 rebate that the Virachacks did not choose was not a "charge." It did not change the car's sale price. It was not an added expense or additional fee. Nor did University Ford, the only "creditor" in this transaction, *see Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457, 459-61 (5th Cir. 1999), withhold the rebate. Ford Motor Company did, and it did so to avoid the cost of two sales incentives on the same sale, not to discourage the Virachacks or other car buyers from purchasing on credit. *See* 12 C.F.R. 226.4(b)(9) & Supp. I, ¶4(b)(9)(i).

Here, the Virachacks could have accepted Ford Motor Company's $2,000 cash rebate and still have financed their purchase at University Ford at a non-promotional rate. They became ineligible for the cash rebate only because

they obtained financing at the special 0.9% rate, not because they bought on credit rather than paying cash.

The difference is crucial for TILA purposes, as the district court opinion in this case explains in distinguishing *Walker*. *See* Pet. 23a-27a.

## II. The Issue Is Not Important Enough To Warrant Review

The issue that the Virachacks raise is not of sufficient importance to require this Court's review despite the lack of any conflict among lower court decisions on point.

A decision in this case will only settle the precise question involved in this case. The Ninth Circuit's opinion already serves that function, however. It tells car dealers that they need not include a forgone optional cash rebate in the finance charge or APR for TILA purposes. There is no confusion on that point now and hence no reason for the Court to grant review and affirm.

Even were the Court convinced that the Ninth Circuit misinterpreted TILA on this point, it could rely on the FRB to provide the necessary corrective through an appropriate regulatory change. There is no need for the Court to step in as no broader principle of TILA's application or interpretation is called into question.

## III. Administrative Resolution Of The Issue Is Preferable

The Court should also deny the petition because an administrative resolution of the issue it raises is preferable to a judicial decision on the point.

"Congress has specifically designated the [FRB] and staff as the primary source for interpretation and application of truth-in-lending law." *Household Credit Serv., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004), *quoting Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). "TILA itself does not explicitly address whether [forgone manufacturer's cash rebates] are included within the definition of 'finance charge.'" *Pfennig*, 541 U.S. at 239. Nor does Regulation Z expressly settle the question.

"It is appropriate to defer to the Federal Reserve Board and staff" to fill such gaps in TILA and its implementing regulation" rather than rushing to fill them by judicial decision. *Milhollin*, 444 U.S. at 560. In such situations, "caution must temper judicial creativity in the face of legislative or regulatory silence." *Id.* at 565.

First, "[t]he Act is best construed by those who gave it substance in promulgating regulations thereunder." *Id.* at 566 (fn. omitted). "[S]triking the appropriate balance [between complete disclosure and informational overload] is an empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process." *Id.* at 568-69. The FRB is also better equipped to resolve how any disclosure of a forgone alternative sales incentive is to be integrated with other required disclosures, such as the total of payments.[6]

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[6] The total of payments should equal amount financed plus finance charge. There are four alternative ways to bring total of payments back into line with those items if the finance charge must be increased by the forgone cash rebate (which was $2,000 in this case): (1) Increase the disclosed amount of each real monthly payment by a fictional amount

(Continued on following page)

Second, Congress has "evince[d] a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568 (citations omitted). A court decision of the issue the Virachacks raise will necessarily operate retrospectively, *see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993), potentially subjecting many innocent car dealers to statutory damages of $500,000 or one percent of their net worth, 15 U.S.C. §1640(a)(2)(B). By contrast, the FRB can avoid this unfair imposition by providing any needed guidance or change through prospective adoption of an amendment to Regulation Z or by appropriate staff commentary.

## IV. No Dire Consequences Will Flow From The Ninth Circuit's Decision

Attempting to stir the Court's sympathy or interest, the Virachacks repeatedly quote out of context the penultimate sentence of the majority opinion below, claiming that it will somehow "encourage the already-rampant deceptive practices of car dealers," "nullif[y] the core purpose of TILA," and set "an extremely dangerous precedent – allowing courts to decide paternalistically and after-the-fact that the consumer got a 'good deal' so there was no disclosure problem under TILA." Pet., 7, 9, 12, 18.

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that, over the contract term, will equal $2,000; (2) Disclose an initial fictional payment of $2,000 followed by 48 real monthly payments; (3) Increase the downpayment by a fictional $2,000; or (4) Reduce the cash price by $2,000 from the actual negotiated price. None of these alternatives is without its own difficulties and potential for misleading car buyers.

Nothing could be further from the truth. First, this case does not involve any deceptive practice. The Virachacks did not allege a claim for fraud or violation of California's Consumers Legal Remedies Act, which proscribes various specific unfair or deceptive acts or practices in the sale of goods, or the state's Unfair Competition Law, which bans "fraudulent" business practices generally. *See* Cal. Bus. & Prof. Code, §17200; Cal. Civ. Code, §1770. Those statutes and the common law of fraud will continue to provide car buyers ample remedies against car dealers who engage in deceptive practices. Those remedies are completely unaffected by the Ninth Circuit's decision in this case.

Instead, the issue here is only whether TILA requires a cash rebate forgone in favor of promotional rate financing to be disclosed as part of the finance charge and APR. Disclosure of the cash rebate in that manner will not prevent deceptive practices. Even the law review article that the Virachacks repeatedly cite states that more disclosure is not the way to halt deceptive practices:

> The typical response to seller control and abuse in this bargain market has been to propose more regulated disclosure. But more disclosure runs the risk of information-overload. . . . Critical buyer-oriented information is available, but most car buyers do not access and utilize available protective devices. And it remains speculative whether additional disclosure rules will significantly rework the market, making it more efficient and equitable.

Stephen A. Plass, *Bargain Avoidance in a Competitive Bargain Market: The Car Sales Conundrum*, 2 Wyo. L. Rev. 1, 8-9 (2002) (fns. omitted).

Second, the Ninth Circuit's majority opinion did not hold that the forgone cash rebate was not a "finance charge" for TILA purposes simply because the Virachacks got a "good deal." Instead, the opinion first determines that the forgone manufacturer's rebate is not a "finance charge" because the rebate was not paid or withheld to induce payment by means other than the use of credit. Pet. 7a-8a, citing 12 C.F.R. § 226.4(b)(9) & Supp. I, ¶ 4(b)(9).

The Ninth Circuit's majority opinion then correctly holds that the Virachacks' TILA claim is not aided by their assertion that they did not know about the alternative cash rebate and so never got to choose between the alternative forms of manufacturer's incentives available to them. Pet. 9a. The nature of the charges imposed determines whether they are finance charges for TILA purposes. If they are finance charges, they must be disclosed as such, whether the consumer holds a PhD in auto finance or is completely unknowledgeable in that respect. If they are not finance charges, they cannot be disclosed in that manner, again regardless of the consumer's knowledge or ignorance.

Solely with respect to the Virachacks' irrelevant plaint that they did not know they might have chosen a cash rebate, the Ninth Circuit majority opinion remarks:

> Compliance with the TILA did not require them to be informed to this extent. They got a good deal. Seeking to get a windfall, they cannot get more than the statute and its regulations afford them.

Pet. 9a.

Read in context, the "got a good deal" observation portends no earth-shaking consequences. Nor does this Court grant certiorari to edit five words from a Court of Appeals opinion that otherwise reaches the same result as all other published lower court decisions on a comparatively unimportant issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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